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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 U.S. EQUAL EMPLOYMENT
12 OPPORTUNITY COMMISSION,

13 Plaintiff,

14 v.

15 PC IRON, INC.,

16 Defendant.
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Case No.: 16-cv-02372-CAB-(WVG)

**ORDER ON MOTION FOR
ATTORNEYS' FEES
[Doc. No. 121]**

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19 This matter is before the Court on Defendant PC Iron Inc.'s ("PCI") Motion for
20 Attorneys' Fees and Costs Against Plaintiff EEOC. [Doc. No. 121.] The motion has been
21 fully briefed, and the Court finds it suitable for determination on the papers submitted and
22 without oral argument in accordance with Civil Local Rule 7.1(d)(1). For the following
23 reasons, Defendant's motion is granted in part and denied in part.

24 **I. Background**

25 Elsa Perez, a former Assistant Officer Manager at PCI, filed a charge of
26 discrimination with the EEOC on August 24, 2012. [Doc. No. 50-3 at 38.] On the same
27 day, the California Department of Fair Employment and Housing ("DFEH") issued a notice
28 to PCI and Perez that Perez's complaint was referred by the EEOC and that the EEOC

1 would be responsible for processing the complaint. [Doc. No. 51-3 at 47.] On June 1,
2 2016, the EEOC issued a letter of determination to PCI. [*Id.* at 49.]

3 On September 21, 2016, the EEOC filed this action against defendant PCI, alleging
4 PCI discriminated against Ms. Perez, based on her pregnancy and/or recent childbirth, in
5 violation of Title VII of the Civil Rights Act of 1964, as amended, the Pregnancy
6 Discrimination Act of 1978 (“Title VII”). [Doc. No. 1.]¹ The EEOC’s complaint, as
7 amended on December 15, 2016, sought to provide appropriate relief to Ms. Perez and
8 correct unlawful employment practices on the basis of sex. [Doc. No. 5.] On September
9 5, 2017, Ms. Perez filed a complaint in intervention against PCI directly seeking relief for
10 the alleged discrimination. [Doc. No. 20.]

11 The parties filed cross motions for summary judgment on February 27, 2018. [Doc.
12 Nos. 48, 50, 51 and 54.] PCI moved for summary judgment on the EEOC’s Title VII
13 hostile work environment claim on the grounds that it was time barred and also moved for
14 summary judgment on Ms. Perez’s Title VII hostile work environment claim and her six
15 state law claims on the same grounds. The EEOC moved for summary judgment on eleven
16 of PCI’s affirmative defenses. Ms. Perez moved for summary judgment on her wrongful
17 discharge claim. On May 1, 2018, the Court issued an order granting in part and denying
18 in part the motions. The Court granted summary judgment in PCI’s favor on the hostile
19 work environment claim because Perez did not timely file her charge with the EEOC.
20 [Doc. No. 73 at 5-7.] Within the order, the Court addressed PCI’s assertion that the
21 EEOC’s claims were barred because it failed to fulfill its statutory duties to conciliate the
22 claims brought under Title VII and the Pregnancy Discrimination Act. [*Id.* at 15-16.]
23 Although the Court found the EEOC’s letter of determination inadequate regarding the
24 hostile work environment claim, it determined the deficiencies harmless because it had
25 entered summary judgment on that claim. [*Id.* at 16.] As to the discrimination claim, the
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28 ¹ Document numbers and page references are to those assigned by CM/ECF for the docket entry.

1 Court concluded that the EEOC's efforts to conciliate survived the level of review required
2 by it. [*Id.*]

3 The matter was set for trial commencing July 30, 2018. [Doc. Nos. 73, 77.] On July
4 6, 2018, Ms. Perez and PCI filed a joint motion to dismiss her complaint in intervention.
5 [Doc. No. 97.] The dismissal with prejudice was entered on July 9, 2018. [Doc. No. 99.]
6 The Court thereafter directed the EEOC and PCI to submit a revised Pretrial Order,
7 recognizing the matter was now solely a request for injunctive relief to correct the alleged
8 unlawful employment practice on the basis of sex, and would therefore proceed as a bench
9 trial. [Doc. No. 100.] The July trial date was vacated and trial was reset for October 29,
10 2018. [Doc. No. 102.] The revised Pretrial Order was entered on September 18, 2018.
11 [Doc. No. 104.]

12 The EEOC and PCI proceeded to a two-day bench trial on October 29 and 30, 2018.
13 [Doc. Nos. 110, 112.] Based upon the testimony and exhibits received into evidence at
14 trial, and after full consideration of the legal arguments of the parties, the Court determined
15 that the EEOC has not met its burden to demonstrate that Perez had suffered an adverse
16 employment action, finding that PCI and Ms. Perez had "reach[ed] a mutual and voluntary
17 agreement for Ms. Perez to separate her employment and she was not subject to an adverse
18 employment action." [Doc. No. 118 at ¶¶ 33, 38.] In accordance with this finding, the
19 Court entered judgment for PCI. [Doc. No. 119.]

20 On December 4, 2018, Defendant filed its application for attorneys' fees, requesting
21 a total of \$189,353.00.² [Doc. No. 134 at 2.] Plaintiff filed its opposition [Doc. No. 126]
22 and Defendant filed its reply [Doc. No. 134].

23 II. Legal Standard

24 Pursuant to 42 U.S.C. § 2000e-5(k) a district court may grant attorneys' fees to a
25 prevailing party in a Title VII action. An award of fees to a prevailing defendant must be
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28 ² The original request for \$175,232.00 [Doc. No. 121] was updated to include \$14,121.00 in fees incurred since filing the motion.

1 based upon a district court's "finding that the plaintiff's action was frivolous, unreasonable,
2 or without foundation, even though not brought in subjective bad faith." *Christiansburg*
3 *Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978). "The plaintiff's action must be
4 meritless in the sense that it is groundless or without foundation." *Hughes v. Rowe*, 449
5 U.S. 5, 14 (1980). An action is frivolous "when the result appears obvious or the arguments
6 are wholly without merit." *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007); *see*
7 *also Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) ("a case is frivolous if it is of
8 little weight or importance: having no basis in law or fact.") (internal quotation marks and
9 citation omitted). But, a claim is not frivolous merely because the "plaintiff did not
10 ultimately prevail." *EEOC v. Bruno's Rest.*, 13 F.3d 285, 287 (9th Cir. 1993) (quoting
11 *Christiansburg*, 434 U.S. at 421-22).

12 In making this determination, "it is important that a district court resist the
13 understandable temptation to engage in *post hoc* reasoning by concluding that, because a
14 plaintiff did not ultimately prevail, his action must have been unreasonable or without
15 foundation." *Id.* In other words, "a district court must assess the claim at the time it the
16 complaint was filed." *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1060 (9th Cir.
17 2006) (internal citations omitted); *Mitchell v. Office of L.A. Cnty. Superintendent of Schs.*,
18 805 F.2d 844, 846-47 (9th Cir. 1986) (the court must assess whether the plaintiff could
19 reasonably have believed that there was an adequate basis in law and fact to pursue the
20 claim). Thus, the Ninth Circuit has urged district courts to "exercise caution in awarding
21 fees to a prevailing party in order to avoid discouraging legitimate suite that may not be
22 'airtight.'" *Bruno's Rest.*, 13 F.3d at 287 (quoting *Christiansburg*, 434 U.S. at 422).
23 Because, "[o]nly in exceptional circumstances did Congress intend that defendants be
24 awarded attorney's fees under Title VII." *Mitchell*, 805 F.2d at 848.

25 **III. Discussion**

26 Defendant seeks an award of \$189,353.00 in attorneys' fees arguing that, as the
27 prevailing party under Title VII, it should be awarded fees because the claims the EEOC
28 asserted against it were frivolous, unreasonable and without foundation. PCI asserts the

1 EEOC failed to conduct a good faith investigation, failed to conduct a thorough interview
2 of the charging party in direct contravention of its own procedures as set forth in the
3 EEOC's Regional Attorneys' Manual, and failed to conciliate the hostile work environment
4 claim prior to filing suit. PCI posits that had the EEOC done these things it would have
5 become evident that Ms. Perez's hostile work environment claim was barred by the
6 applicable statute of limitations and that a thorough investigation would have revealed the
7 myriad of issues with Ms. Perez's claims. [Doc. No. 121 at 12-18.]

8 The Court is familiar with this case, parties, and background, having addressed a
9 motion to intervene, motions for summary judgment and held a bench trial. Applying the
10 standard set forth above, the Court find that Plaintiff's hostile work environment was
11 frivolous at the outset. *Mitchell*, 805 F.2d at 848 ("There is a significant difference between
12 the bringing of cases with no foundation in law or facts at the outset and the failure to
13 present evidence sufficient to justify relief at trial."); *see also Galen*, 477 F.3d at 658 ("An
14 action [is] frivolous when the result appears obvious or the arguments are wholly without
15 merit."). However, the Court does not find the EEOC's discrimination claim was frivolous,
16 unreasonable, or without foundation, notwithstanding its finding following the bench trial
17 that the evidence did not support a finding of an adverse employment action.

18 One of the conditions precedent to the EEOC filing suit is that is must conduct a
19 genuine investigation. *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 607 (9th Cir. 1982)
20 ([g]enuine investigation, reasonable cause determination and conciliation are jurisdictional
21 conditions precedent to suit by the EEOC"); 42 U.S.C. § 2000e-5(b). The Court's
22 familiarity with the evidence and record in this case leads it to conclude that the EEOC
23 failed to take the necessary steps to thoroughly investigate Ms. Perez's allegations before
24 the EEOC filed the Title VII suit against PCI. The EEOC's investigation case log [Doc.
25 No. 121-5] illustrates that the EEOC waited over three years before it interviewed any of
26 the witnesses upon whom it relied. As Defendant highlights, the log demonstrates that the
27 EEOC interviewed only two former employees, Gary Berkstresser and Desarea Dutra, and
28 Elaine Rossi, a temporary employee who worked at PCI for two weeks in September 2011

1 [Id.] It also indicates that after giving her initial interview, Ms. Perez herself was never re-
2 interviewed. [Id.] At the bench trial, the Court found Ms. Perez, Mr. Berkstresser and Ms.
3 Rossi's testimony about the office interactions between Ms. Suits and Mr. Anderson
4 regarding Ms. Perez's pregnancy "to be unreliable and either exaggerated or not credible
5 in many instances." [Doc. No. 118 at 6.] Further, the Court noted a number of
6 inconsistencies in Ms. Perez's deposition testimony and an inability on the Ms. Perez's part
7 to keep her account of what happened at PCI consistent. [See generally Doc. No. 118.]
8 Such issues would have become clear to the EEOC had it conducted, as PCI emphasizes, a
9 thorough interview of the charging party as set forth in its Regional Attorneys' Manual.
10 Neither did the EEOC talk with either Mr. Anderson, the owner, president and chief
11 operating officer of PCI, Ms. Suits, or two other PCI employees, Mr. Moody or Mr.
12 Gunther who worked in close proximity to the area shared by Ms. Perez and Ms. Suits,
13 before filing suit. In light of the inconsistencies and credibility issues surrounding the
14 testimony of Ms. Perez, Ms. Rossi and Mr. Berkstresser, the Court cannot help but question
15 whether it was reasonable for the EEOC to base its decision to file a lawsuit against PCI
16 based solely on these individuals' recitation of events.

17 Had the EEOC conducted a proper investigation it would have discovered, as the
18 Court recognized in its summary judgment order, that the four interactions Ms. Perez
19 alleged occurred within the 300 day window preceding the filing of her charge on August
20 24, 2012 were not discriminatory or abusive acts. The only contact Ms. Perez's had with
21 PCI after October 29, 2011 consisted of: (1) a telephone call with Ms. Suits, PCI's office
22 manager, on December 2, 2011, asking if Ms. Perez intended to return to work at the end
23 of her maternity leave; (2) Ms. Perez visiting PCI's offices with childcare assistance
24 forms³; (3) Ms. Perez calling Ms. Suits on December 6, 2011, to ask if Ms. Suits had
25 completed the forms, and (4) Suits' telephone call on December 9, 2011, during which
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28 ³ Following trial, the Court's Findings of Fact contradict the events as relayed by Ms. Perez and relied on
in the summary judgment order. [See generally, Doc. No. 118.]

1 Perez's employment was terminated. [Doc. No. 73 at 6-7.] "As a result, because none of
2 the other acts about which Perez and the EEOC complain as constituting a hostile work
3 environment occurred within 300 days of Perez filing her charge with the EEOC, Perez's
4 Title VII hostile work environment charge to the EEOC was untimely." [Doc. No. 73 at
5 7.] As Defendant correctly points out, had a thoroughly investigation taken place, it would
6 have become evident that the facts upon which the EEOC was relying to form the basis of
7 the hostile work environment claim were outside the statute of limitations.

8 Even if the Court takes the position that the EEOC's hostile work environment claim
9 was not frivolous when filed, once Ms. Perez and other key witnesses had been deposed it
10 should have been clear that the EEOC's hostile work environment lacked foundation. *See*
11 *EEOC v. Argo Dist., LLC*, 555 F.3d 462, 473 (5th Cir. 2009) (affirming award of attorney's
12 fees to prevailing defendant because once the charging party's deposition was taken it was
13 clear the EEOC's action lacked foundation); *EEOC v. Peoplemark, Inc.*, 732 F.3d 584,
14 591-92 (6th Cir. 2014) (when discovery clearly indicated complaining party's statements
15 belied the facts, the EEOC should have reassessed the claim). Nevertheless, the EEOC
16 pursued the hostile work environment claim through the end of discovery and summary
17 judgment, forcing PCI to defend a claim that clearly frivolous. The EEOC's decision to
18 do so, and its failure to reassess this claim once the evidence did not furnish the necessary
19 facts to prove this claim, provide further support in favor of an award of fees to PCI.

20 With regards to the hostile work environment claim, PCI also suggests that the
21 EEOC's failure to conciliate the hostile work environment claim prior to filing suit is
22 further evidence that the EEOC was "simply going through the motions in this case so that
23 if could file a claim against PCI." [Doc. No. 121-1 at 13-14.] In support PCI points to the
24 Court's earlier finding in the summary judgment order that:

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26 [t]he letter of determination simply states that there "was evidence that [Perez]
27 was subjected to a hostile work environment." [Doc. No. 48-8 at 2.] This
28 vague and conclusory statement is particularly inadequate considering that
Perez's charge of discrimination does not allege a hostile work environment

1 or make any allegations other than that she was terminated because of her sex
2 and pregnancy. [Doc. No. 48-5 at 3.] With its motion, the EEOC offers no
3 evidence that PCI was aware of any charge of a hostile work environment or
4 that the EEOC was investigating such a claim. The conclusion that evidence
5 of a hostile work environment was found did not serve to inform PCI of what
6 allegations of a hostile work environment were made.

7 Doc. No. 73 at 15-16.

8 The procedural requirements of Title VII require the EEOC to engage in conciliation
9 efforts prior to filing suit. *See* 42 U.S.C. § 2000e-5(b) (“If the Commission determines
10 after an investigation that there is reasonable cause to believe that [a] charge is true, the
11 Commission shall endeavor to eliminate any such alleged unlawful employment practice
12 by informal methods of conference, conciliation, and persuasion.”) Only if the EEOC “has
13 been unable to secure from the respondent a conciliation agreement acceptable to the
14 Commission,” may it bring a suit against the employer. 42 U.S.C. § 2000e-5(f)(1). While
15 the Court agrees with PCI that the EEOC did not comply with its condition precedent of
16 conciliation regarding the hostile work environment claim as set forth in 42 U.S.C. §
17 2000e-5(b), the Ninth Circuit has made it clear that this alone is not reason to grant fees.
18 *Bruno’s Rest.*, 13 F.3d at 291. Nonetheless, this provides yet further evidence of the
19 EEOC’s haphazard and flagrant disregard of the procedures it is required to follow before
20 filing suit.

21 Although, the Court concluded after a two-day bench trial that the EEOC failed to
22 present any direct or circumstantial evidence sufficient to establish a prima face case of
23 discrimination under Title VII, the Court cannot say that this claim was meritless. After
24 hearing all of the testimony and weighing the evidence, the Court held that the EEOC had
25 not demonstrated that Ms. Perez had suffered an adverse employment action. [Doc. No.
26 118 at 9-10.] In fact, the Court determined that the parties had reached a mutual and
27 voluntary agreement for Ms. Perez to separate her employment from PCI and make an
28 application for unemployment benefits. [*Id.* at 10.] PCI’s point concerning the EEOC’s
failure to properly investigate, interview Ms. Perez and interview two other significant

1 witnesses is well taken. [Doc. No. 121 at 14-15.] Had the EEOC conducted a thorough
2 investigation before bringing suit, it would have discovered that Ms. Perez was not denied
3 any pregnancy or childbirth-related accommodation, that she took full maternity leave, that
4 at the time she was on leave she was actively seeking other employment opportunities, that
5 PCI has used a temporary agency to fill Ms. Perez's position during her maternity leave,
6 and that it was Ms. Perez who would not in fact confirm that she was ready to return to
7 work on her anticipated start date. For reasons unclear to the Court, the EEOC attributed
8 every employment interaction that Ms. Perez found offensive or did not like, to her
9 pregnancy. Perhaps it should have been evident by the close of discovery that Plaintiff had
10 little evidentiary foundation for its claim that Ms. Perez had suffered an adverse
11 employment action, but there was some evidence to support a theory of an adverse
12 employment action. As the EEOC correctly point out, an "airtight" claim is not a
13 prerequisite for filing suit. Thus, just because the EEOC did not ultimately prevail on the
14 adverse employment action claim, the Court must still refrain from engaging in *post hoc*
15 reasoning and concluding that the EEOC's adverse employment action claim must have
16 been unreasonable or without foundation. *Christiansburg*, 434 U.S. at 421-22. Although
17 the EEOC's discrimination claim against PCI was extremely weak, the Court does not find
18 that there was no legal or factual basis for it.

19 In sum, while the Court is aware of the public policy reasons for exercising caution
20 when considering an award of attorneys' fees, the EEOC is the federal agency responsible
21 for administering and enforcing civil rights laws against workplace discrimination and, as
22 such, it should to be the foremost expert on issues of employment discrimination and be
23 held accountable for complying with both its enabling act and its regulations along with
24 following the procedures set forth in its internal manual. The EEOC had a duty to perform
25 a competent investigation on both claims and to conciliate the hostile work environment
26 claim. Had it done so, the EEOC would have known long before the summary judgment
27 stage that the hostile work environment claim was barred by the statute of limitations.
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1 Accordingly, the Court concludes that an award of reasonable attorneys' fees related to the
2 hostile work environment claim to Defendant is warranted.

3 **IV. Reasonable Attorneys' Fees**

4 Having determined that the hostile work environment claim was "frivolous,
5 unreasonable, or without foundation," the Court must determine is the requested amount is
6 reasonable. Defendant seeks an attorney's fee award of \$189,353.00 to cover the hours
7 worked in defending this litigation from its inception through trial and the bringing of the
8 current motion.

9 While Plaintiff does not dispute the reasonableness of the fees incurred by Defendant
10 nor the reasonableness of the hourly rate, it maintains that no fees are warranted, and argues
11 that if the Court determines that an award is warranted, it should only be limited to fees
12 incurred from the frivolous claim and not the entire litigation. The Court agrees. Because
13 the Court has determined that one claim is frivolous and one claim is not, PCI is not eligible
14 for the fees incurred defending the adverse employment action claim. Thus, PCI may only
15 be awarded fees for frivolous claims and bears the burden of establishing that the fees "for
16 which it is asking are in fact incurred solely by virtue of the need to defend against those
17 frivolous claims." *Harris v. Maricopa Cnty. Super. Ct.*, 631 F.3d 963, 972 (9th Cir. 2011).

18 As the Ninth Circuit explains:

19 [a] defendant must demonstrate that the work for which it asserts that it is
20 entitled to fees would not have been performed but for the inclusion of the
21 frivolous claims in the complaint. To do otherwise—as when a court simply
22 divides a defendant's total attorneys fees equally across plaintiff's frivolous
23 and nonfrivolous claims and attributes to the frivolous civil rights claims a
24 pro-rate share of those total fees (with no demonstration that such fees were
25 in fact incurred solely in order to defend against the frivolous claims)—would
be to risk requiring a plaintiff to pay defendants' attorneys' fees incurred in
defeating his nonfrivolous civil rights claims, an outcome barred by our
precedent and that of the Supreme Court.

26 *Harris*, 631 F.3d 963, 972 (2011); *see also Fox v. Vice*, 563 U.S. 826, 836 (2011) ("Section
27 1988 permits the defendant to receive only the portion on his fees that he would not have
28 paid but for the frivolous claim.") The *Harris* court went on to acknowledge that from a

practical standpoint this is an extremely difficult burden for a defendant seeking fees to carry. *Harris*, 631 F.3d at 972.

The Court has reviewed the itemized description provided by defense counsel and although there are multiple entries for the work performed until the filing of the motions for summary judgment, the Court is prohibited from dividing time entries between frivolous and nonfrivolous claims. *Harris*, 631 F.3d at 973 (the “only fees that may be awarded are those incurred for work performed exclusively in order to provide a defense against claims for which fees are permissible”). Applying the “extremely difficult” standard set forth above, the Court has found only two entries that defendant has attributed to work solely on the frivolous claim:

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|------------|-----|------|--------|------------|--|
| 02/14/2018 | RMP | 2.00 | 225.00 | \$450.00 | Begin drafting memorandum of points and authorities in support of motion for summary judgment on EEOC hostile work environment claim. |
| 02/14/2018 | RMP | 7.20 | 225.00 | \$1,620.00 | Draft notice of motion and motion for summary judgment. Draft notice of lodgment. Continue drafting memorandum of points and authorities in support of motion for summary judgment on EEOC hostile work environment claim. |

[Doc. No. 121-3 at 15.] Meaning Defendant has, for the most part, failed to meet its burden, establishing only that Mr. Poole worked a total of 9.2 hours on February 14, 2018 and February 15, 2018 on the summary judgment motion related to the EEOC’s hostile work environment claim. Thus, the Court finds that Defendant PCI is entitled to \$2,070.00 in attorneys’ fees for work attributable exclusively to the hostile work environment claim.

Having determined which fees are recoverable, the Court must determine whether the hourly rate and number of hours billed was reasonable. Here, defendant seek hourly rate of \$225 for Mr. Poole [Doc. No. 121-2 at ¶¶ 4, 5.] Defendant submits a declaration

1 from its counsel setting forth counsel's qualifications. [*Id.*] The Court finds, and Plaintiff
2 does not dispute, that the rates set forth by Mr. Poole are within the range of reasonable
3 rates for attorneys in the local community. The Court has also reviewed the records, and
4 finds no need to exclude any of the reported 9.2 hours, finding them to be a reasonable for
5 work related to the summary judgment motion on the hostile work environment claim.
6 Accordingly, the Court awards Defendant \$2,070.00 in attorneys' fees for work attributable
7 exclusively to the EEOC's frivolous hostile work environment claim against PCI.

8 **V. Conclusion**

9 In accordance with reasons set forth above, Defendant is awarded \$2,070.00 in
10 attorneys' fees. Accordingly, Defendant's motion for attorneys' fees [Doc. No. 121] is
11 **GRANTED IN PART** and **DENIED IN PART**.

12 It is **SO ORDERED**.

13 Dated: March 4, 2019



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15 Hon. Cathy Ann Bencivengo
16 United States District Judge
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